CARTELS: A VIEW FROM BRAZIL

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I. Initial Facts:

1. The relevant law is, in first place, Law 8884 of 1994 (the Law), at some points modified or complemented by Law 10149 of 2000 (the Complementary Law), which contains all the general provisions regarding competition matters. It establishes both merger control rules and how do define, deter and punish anti-competitive conduct, including, although not limited to, cartels (which are considered, in fact the worst conduct). There is also Resolution 20, of 1999, issued by CADE (see below), which contains some (usually not very precise) definitions of anti-competitive conduct.

2. The record of prosecution of cartels in Brazil is still poor. Considering that the statistics are also poor and unreliable, we had to develop our own (sort of in-house) statistics, in order to provide some figures. For these figures we used the initial year of 1999 because this is when the sheet steel leading case was decided.

3. So, from 1999 to 2006, during a period of time encompassing eight years, we had 47 convictions, mostly for price fixing. Of the 47 cases, 4 are in the industrial sector (sheet steel, naval construction, pharmaceuticals and stones for civil construction), 8 are in the commercial sector (gas stations and domestic gas distribution, respectively 6 and 2) and 35 refer to services. Among the latter, 26 are in the health sector (associations of hospitals, doctors and others), travel agents, accountants, air transport, urban transport, cable television, newspapers and driving education. The common interpretation of the predominance of services can be explained, with maybe two exceptions, by the general unawareness of the illegality, what makes these cases very easy for the authorities. Notwithstanding all the above mentioned convictions, there are many ongoing investigations, under different procedural phases. All mentioned cases refer to price fixing, by far the best understood practice, except for the naval construction case, belonging to the bid rigging class, and the pharmaceuticals case (see below), which cannot be easily described. This easier understanding of price fixing goes back to a past of very high inflation and a tradition of (obviously mistaken and misleading) price control.

4. Article 20 of the Law provides that "notwithstanding malicious intent, any act in any way intended to or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order: I – to remit, restrain or in any way injure open competition or free enterprise; II – to control a relevant market or a certain product or service; III – to increase profits on a discretionary basis; and IV – to abuse one´s market control".

5. Article I-1 of the Annex to the Resolution defines cartels as "specific arrangements, which may be explicit or tacit, made by competitors in the same market and covering a substantial part of the relevant market, involving matters such as prices, production quotas and territorial distribution and division, in a joint attempt to raise prices and profits to near-

monopolies levels". It is clear, according to the Resolution, that cartels are horizontal arrangements only and can involve any kind of arrangement, eg market allocation, price fixing, bid rigging, output limitation and everything that the human mind can create.

6. Paragraph 4 of article 173 of the Constitution states that "the law will restrain abuses of economic power that aim at market domination, elimination of competition or increase of profits on a discretionary basis". So, there must be some kind of intent behind the behavior for it to be anti-competitive. This leads us to the unavoidable conclusion that there are no per se violations and the expression "notwithstanding malicious effect" may not be applicable because it is against the Constitution. Anyway, there are no judicial precedents and CADE has lately been using the per se rule although not mentioning it as such.

II. Investigation:

7. It is usually said that Brazil, not sure that only one agency would do a good job, decided to have three of them. However, there is really only one agency (Administrative Council for Economic Defense – CADE), which is an independent and the ultimate decision-making agency. The investigation itself is, however, done by the Secretariat of Economic Law (SDE), of Ministry of Justice, which, at the end of any investigation, can either dismiss the case, with an automatic (*ex-officio*) appeal to CADE or send the case to CADE with a recommendation for punishment. There is also Secretariat of Economic Assistance (SEAE), of Ministry of Finance, in charge or supplying economic expertise and which, at some occasions, has triggered cases.

8. It is interesting to remark that CADE has been, during all its existence, totally independent and free from political influence. One of the reasons may be the fact that the Commissioners have tenures during which they cannot be dismissed. SDE and SEAE can theoretically be subject to political influence, because they are located in the Executive Branch. However, the tradition is independence and technical analysis, although some times biased by a natural tendency to convict. There are not, anyway, recent major problems with the due process of law.

9. CADE has 7 Commissioners, including the President, chosen by the President of the Republic (normally upon recommendation of the Minister of Justice) among lawyers and economists. It happens that, due to the low salaries, together with the conflicts faced during – and some time after - the tenures, most of the Commissioners come either from civil service or from the academia, because successful lawyers and economists of the private sectors usually do not accept such appointments. SDE, the investigative body, due to the lack of an established career until one year ago, is usually managed by very young – although talented and dedicated – people who, of course, lack some experience. The new career is also young but we expect that these people will stay there and increase the general culture of SDE. It is often odd for a senior lawyer to deliver his arguments before recently graduated (sometimes pimpled) lawyer (or economist, as the case may be). Of course they do their best to compensate the lack of experience with natural talent and thorough dedication. On top of it, there is a very high turnover. SEAE is the governmental body

with a career for its economists, who usually are experienced. However, the three of them are under-dimensioned for the important job they have to perform.

10. Keeping track of the market is always difficult for these people, due mainly to the lack of resources. Information is often problematic (in the sense that it may cost unavailable money and time. The private companies that submit their cases before the authorities are often the best (because there is no cost) source of information that the authorities find. This situation is changing, although slowly, with the communications among the various Governmental bodies supplying information to each other.

11. Investigations can be triggered either by a private notification or by the authorities themselves (although it seldom happens), due to their general obligation to monitor the markets. The investigations follow some already known procedures, but generally there is an interested party supplying evidence against the accused parties. The investigative powers are almost unlimited – except for what is related to the due process of law – and they include deposition of witnesses, documents and others. Since the Complementary Law we have the possibility of unannounced raids, which lately became very popular, although they started in a somewhat awkward way. These raids are only possible after a judicial order and thus depend on the ability of the authorities to convince the judges.

12. But the main problem is still further. The investigation is, as described above, totally administrative. However, due to a Constitutional provision, there are no exemptions to judicial reviews of administrative acts or decisions and thus just about all decisions about cartels are being challenged before the Judiciary. There are many problems here, starting with the well known lack of structure of the Brazilian Courts, which is enhanced, in competition issues, by the need of economic analysis, which is quite strange for most of the Judges. A relevant market definition, which is quite obvious and straightforward for a competition lawyer, may be a major problem for a Judge because it does not fit in any mental systems to which he/she is used; it must be remembered that Brazil is a civil law country with a codifying tradition (it is true that countries in Continental Europe also follow civil law, but their historical background may have made things easier). The outcome of this problem is that, having virtually all cases still in Court, we still did not develop a sound judicial jurisprudence.

III. Trends:

13. As seen before, there are some trends in cartel investigations, although they are not yet very clear. In Brazil it has been difficult, even with dawn raids, to go after the industrial sector, due to the lack of investigative resources. Services are the first and easiest choice, because professional associations tended to fix minimal prices, claiming to act on behalf of their members against the higher power of health insurance companies. If we look at convictions instead of ongoing investigations, we do not see trends at all. Of course and as in any other jurisdictions, oligopolies in concentrated markets dealing with homogeneous products are always claiming a special look. Leniency, although still recent, is starting to change the scene. There are a few cases in which evidence – notwithstanding challenges by the accused parties – is being provided from inside. There are still some difficulties with leniency agreements, and the main of which remains in the criminal exemption that it is

supposed to provide; some criminal lawyers are afraid that, using the Constitution against the Complementary Law, Public Attorneys may allege that the criminal exemption, as granted by the Secretary of SDE, cannot hinder the activity of prosecutors.

IV. Leniency:

14. One special point about leniency – introduced in Brazil by the Complementary Law – is cultural. Brazilian culture is against, specially due to problems arisen during totalitarian Governments, all kinds of delation. It is true that most big companies are multinational, but still there is a shock, in this particular issue, with Brazilian culture and it must be dealt with. Besides, being so new, we do not know yet how the Judiciary will see it, mainly in the criminal side (as above mentioned). On the other hand, there is no fear of, as it happens in some countries, class actions, because, on one hand, they do not exist in the same way and, on the other hand, there is no jurisprudence on this matter and the results are consequently unpredictable. Besides, the Courts are usually overloaded.

15. Another point regarding leniency is the impossibility to use the consent decree in cartel cases, since the enacting of the Complementary Law had the aim to push the interested parties toward leniency. But the plan did not work as it was supposed to, and now the authorities are stuck with cartel cases which otherwise could be settled (for everybody´s benefit) but now have to go all the way through since there is no leniency. Even those cases which started with a leniency agreement cannot be settled with the other parties. Settlement, at this point, could be beneficial because these cases would not be taken to the Judiciary.

V. JURISPRUDENCE:

16. At this point it is interesting to show a few decisions, considering that they are definitive as far as the Administration is concerned; they are all, however, still under scrutiny of the Judiciary (the convicted parties against CADE) and there is no possible forecast as to when final decisions will be issued. These are representative cases but neither of them involve leniency, since CADE still did not issue any decision in cases which started with leniency agreements.

17. The sheet steel case (08000.015337/94-48) had its leading decision issued in 1999 against the three Brazilian producers – CSN, Usiminas and Cosipa – for price fixing. The interesting point in this case was a meeting called by the three parties with the Secretary of SEAE, as it was the habit until then, to communicate the price raise. They then faced a new Secretary who accused them of price fixing, because they went together to the meeting with such a purpose. Later on, they argued that the price raise was already known by the customers, and that there was a price leadership system which exempted them from the accusation of conspiracy. The Commission, however, following the Commissioner in charge, understood that there must have been a previous meeting among the three of them, before calling the meeting with the Secretary of SEAE.

18. The evidence was that (i) the market is subject to collusion, due to uniform competitive conditions, including prices, (ii) there is significant market power, (iii) barriers to entry were found and (iv) only few customers have bargain power. These conditions were not enough and the Commission went further analyzing the economic rationale for the collusion. This is certainly the critical point, which is still under scrutiny by the Judiciary, and it is clear how difficult it is for Judges to deal with such an issue, which certainly does not fit in any code. The criticisms that can be here made refer both to the evidence of collusion (supposition, as above mentioned, is obviously a weak reason), since the price raise was already known, and to the lack of evidence related to rationale of the prices themselves, let alone the collusion. Because it was a leading case (and thus part of the competition education), the Commission kept the minimal fine (1% of the last previous year´s turnover).

19. The so called generics case (08012.009088/1999-48) had a decision referring to a meeting among some major pharmaceutical companies (Abbott, Lilly, Schering Plough, Roche, Monsanto, Biosintética, Bristol, Aventis, Bayer, Eurofarma, Akzo Nobel, Glaxo, Merck, Astra Zeneca, Boehringer, Aventis Beringer, Sanofi, Wyeth, Janssen-Cilag and Byk) that held a meeting in which supposedly there was a discussion about how to ban distributors working also in the generic drugs distribution. The minutes of the meeting, after a few versions and hundreds of messages, at some point somebody delivered it to SDE. The source was highly discussed but it became unimportant because the parties did not deny the meeting, although claiming that it was for a general discussion on distribution, with no strategic matters under exam.

20. The minutes were the main evidence not only of the meeting (together with the testimonies) but also of its contents, which was permanently denied by the parties, obviously with no success at all. However, it was clear that the practice was not consummated, given the fact that the generic market became very successful soon after. Anyway, Brazilian law provides for punishment even if the practice is not consummated, and thus the fines were the minimal (1% of the previous year´s turnover), except for the ringleader (2%).

21. There are three criticisms to be made to this decision: (i) it must be considered that being present to a meeting does not automatically turns one into a conspirator; (ii) there was no definition of relevant market (which was deemed unnecessary by SDE), considering that in some cases, in which competitors were not present (given the specific way in which pharmaceuticals are defined), a cartel was impossible; and (iii) SDE did not realize that there are two Merck companies (one originated in Germany and the other originated in the United States) and one of them was left behind. The authorities went on without the forgotten company and did not consider the allegation that if there is a cartel, all parties to it must be encompassed, it being impossible to choose who must be punished and who can be left alone.

22. The shuttle case (08012.000677/1999-70) led to a price fixing decision against the four airline companies (TAM, Varig, Vasp and Transbrasil) which, at that time, held shuttle services between São Paulo and Rio de Janeiro, by far the busiest route in Brazil. The accusation related to the apparent uniform discount policy which supposedly was discussed

in a meeting of the CEOs of the four companies, six days earlier. This, plus the rationale for collusion, was considered enough evidence for a conviction.

23. Criticisms were made by the Commissioner in charge and CADE´s President in dissenting votes. It was found that, having one of the companies (the price leader) passed its price to the Air Tariff Publishing Company (ATPC), immediately the others could know it with no special effort and free from collusion. In addition, the strong competition made it easy for a price leadership scene. It was also argued in the dissenting votes that equal prices does not necessarily mean that there is collusion, which needs unquestionable evidence. The vote considered to be impossible do dismiss the possibility of a non-cooperative strategic independence, often found in oligopolies, and this fact alone does not mean that there is collusion.

VI. CONCLUSIONS:

24. When we try to figure what lessons are to be learned from Brazilian experience, of course we tend to mention the obvious ones, related to the advantages, for the market as a whole, to deter cartels. Of course we agree with them but we want to mention lessons that may not be so obvious. The first lesson is cultural: competition education is by far the best way to deter cartels. It is, eg, clear for everybody that murder and robbery are crimes and must be punished; however, it is not yet clear for most people that price fixing is such an injury (some people still see the Government, in a very faded way, as the "enemy", even if the Government is engaged in enhancing competition by punishing anti-competitive behavior). Competition education will, at some point, penetrate the inner fabric of the society.

25. The second lesson to be learned is about the Judiciary. A lot of time and resources were spent in creating a good administrative system (still very6 under-dimensioned and still with a lot of problems to solve). However, whenever a decision is taken by the administrative authorities, it can be taken to Court. The time and resources spent to create a good administrative system are useless here, unless we develop the same attitude with the Judiciary. It is still an unsolved problem how to explain to Judges the economic fundamentals and, on top of it, demonstrate that they must be used in sentencing. Anyway, the work must be done.

26. The richness of Brazilian experience must not keep us from continuing criticism and, in this way, cooperation to develop a better system.

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